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No. 91-1268

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CITY OF NEWPORT AND JAMES E. PARSONS,
Petitioners,

vs.

ARMINA LEE d/b/a BRASS BULL,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a-15a, is unreported. The opinion of the United States District Court for the Eastern District of Kentucky, Pet. App. 16a-36a is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1991. The petition for a writ of certiorari was filed on February 3, 1992 and was received by Respondent on February 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and is not disputed.

I. COUNTERSTATEMENT OF THE CASE

Respondent Armina Lee is the owner and operator of the Brass Bull, an adult entertainment night club located in Newport, Kentucky. Respondent began operating the club in September of 1984. For each year between 1984 and 1990, Petitioner City of Newport issued and renewed Respondent's occupational license, authorizing her to operate her business at the Brass Bull. The most recent renewal of the license occurred in July of 1990.

On October 25, 1990, the City of Newport issued a Notice to Revoke or Suspend Occupational License to Armina Lee d/b/a Brass Bull. As a factual basis for the notice, the City of Newport stated that two of Respondent's employees had been convicted of prostitution related offenses on May 9, 1990 and May 25, 1990 respectively. Although these convictions were a matter of public record in May of 1990, it is undisputed that the City of Newport renewed Respondent's occupational license effective July of 1990.

When Ms. Lee's occupational license was renewed by the City in July of 1990, she was not offering nude dancing at her club. On October 24, 1990, Armina Lee began offering nude dancing at the Brass Bull. The City of Newport did not issue its Notice until after it became aware that Respondent was offering nude dancing.[1] (Court of Appeals Slip Opinion, p. 5, Appendix to Petition for Writ of Certiorari, p. 5a).

The City of Newport initiated the suspension/revocation proceedings against Armina Lee pursuant to City Ordinance

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[1] Because of the timing of the Notice, and because on two occasions subsequent to the Notice the City offered to resolve the revocation proceedings if Armina Lee would, among other things, agree to cease offering nude dancing "now and in the future", Plaintiff included in her lawsuit a claim that the City was retaliating against her because of her exercise of constitutionally protected rights. Since the Sixth Circuit did not address the First Amendment retaliation claim in its opinion, Respondent will not recite other facts relating to the retaliation claim.

§ 26-39. Subsection(a)(1) of the Ordinance provides in relevant part that a license may be suspended or revoked if, within 12 months prior to notice, an employee of the license holder is convicted of a criminal offense where the underlying conduct occurs on the premises of the license holder. The Ordinance further provides that "a judgment of conviction [of the employee] in any court of competent jurisdiction shall be *conclusive* evidence of such violation . . ." (Emphasis added).[2]

As previously mentioned, the City advised Ms. Lee in the Notice that two of her employees had been convicted of prostitution related offenses. The specific nature of the prostitution charges apparently related to solicitation. At the hearing before the District Court, the city attorney advised the Court that the charges resulted from the fact that an undercover officer "was approached by [Respondent's employees]." (J.A. p. 51). It is undisputed that Armina Lee had no knowledge that these employees had engaged in any illegal conduct on her premises. The uncontradicted testimony further demonstrated that Armina Lee was not otherwise aware of any prostitution or solicitation occurring on her premises prior to the

[2] Newport City Ordinance Section 26-39(a)(1) provides, in relevant part, as follows:

> (a) Any license issued under this division may, with notice to the holder thereof, and a hearing as hereinafter provided for, be revoked or suspended by the Board of Commissioners.
>
> (1) If, within twelve months prior to the date on which charges are filed, there has been a conviction of any licensee or his agent, servants, or employees, for any action or activity occurring in, on, or at the premises covered by the license, in violation of any provision of this division or any other division of the City of Newport, or of any criminal or penal statute of the Commonwealth of Kentucky against gambling, disorderly conduct, or any other criminal or penal offense, and a judgment of conviction in any court of competent jurisdiction shall be *conclusive* evidence of such violation . . . . (Emphasis added).

conviction in question. It was also uncontroverted that Respondent Armina Lee had taken affirmative steps and precautions to prevent such activity from occurring on her premises at the Brass Bull. (See Court of Appeals Slip Opinion, p. 4, Appendix to the Petition for Writ of Certiorari, p. 4a).

The revocation hearing was held before Petitioners' City Commission on January 21, 1991. At that hearing, Respondent Armina Lee presented uncontradicted evidence that Respondent was unaware of the unlawful activity of her employees at the time it occurred, and that she had taken affirmative steps to control her employees to prevent such conduct on her premises. *Ibid.* In spite of the uncontradicted testimony, the Petitioner, acting through the City Commission, suspended Armina Lee's occupational license for a period of six months. The Commissioners also conditionally revoked the license but stayed imposition of that revocation for a period of 18 months. The City Commission held that if there was any further violation of Ordinance Section 26-39(a)(1), Respondent's occupational license would be immediately and finally revoked.

In supporting its decision to suspend and conditionally revoke Armina Lee's occupational license, the City Commission made only one substantive finding of fact:

> That within a period of one year, immediately prior to the bringing of charges against the occupational license aforesaid, there were three charges of prostitution pursuant to K.R.S. 529.020 on the licensed premises by employees thereof which resulted in convictions.

(Findings of the City Commission, J.A., p. 27). The Commission relied on City of Newport Ordinance § 26-39(a)(1) as the sole support for its decision to suspend and conditionally revoke Armina Lee's occupational license. More specifically, the City relied solely on the employees' prior convictions as "conclusive evidence of such violation . . ." (Ordinance § 26-39(a)(1)).

It is important to note that, at the time of the City's decision to suspend Armina Lee's occupational license, the two employees who had been convicted of the prostitution related charges were no longer employed by Ms. Lee. One of the employees had voluntarily quit around the time of her arrest. The second employee was fired by Armina Lee in May of 1990 after Ms. Lee became aware of the employee's conviction. (Slip Opinion p. 15, Appendix to Petition for Writ of Certiorari p. 15a).

Since the Ordinance on its face and as applied by the City Commission created a conclusive and irrebuttable presumption that Armina Lee was unfit to hold a license simply upon a showing of the criminal convictions of employees, Ms. Lee filed suit against the City of Newport pursuant to 42 U.S.C. § 1983 to challenge the suspension and conditional revocation. She argued, among other things, that the ordinance on its face and as applied created an unconstitutional irrebuttable presumption in violation of her rights as secured by the Due Process Clause of the Fourteenth Amendment.[3]

Respondent moved the District Court for a preliminary injunction to bar the City from implementing its suspension and conditional revocation of her occupational license. After an evidentiary hearing, the Court denied the request for a preliminary injunction by Order dated February 1, 1991.

Respondent filed a timely Notice of Appeal with the United States Court of Appeals for the Sixth Circuit which reversed the decision of the District Court. The Sixth Circuit held that the Ordinance under which the City suspended and conditionally revoked Armina Lee's occupational license violated the Due Process Clause of the Fourteenth Amendment in that the "Ordinance thus constitutes an improper imposition of

[3] Armina Lee also asserted other constitutional challenges to the City's decision to suspend and conditionally revoke her occupational license. However, the only issue reached by the Sixth Circuit was the issue of whether the challenged Ordinance unconstitutionally creates an irrebuttable presumption.

strict liability [on the license holder] or creates an irrebuttable presumption and is overbroad." (Slip Opinion, p. 15, Appendix to Petition for Writ of Certiorari, p. 15a). Since the Sixth Circuit declined to address any of the other constitutional claims which Respondent raised in the District Court, consideration of the Petition is necessarily limited to this holding.

II. SUMMARY OF ARGUMENT

A. Respondent demonstrates below that the decision of the Sixth Circuit is consistent with the due process jurisprudence enunciated by this Court in prior decisions. Specifically, Respondent demonstrates that the opinion of the Sixth Circuit does not improperly curtail the lawful exercise of police power by the City of Newport. Rather, the Court of Appeals recognizes the lawful police power of the City but indicates that it is circumscribed by considerations of due process. The Sixth Circuit properly followed this Court's decision in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752 (1987), and in *Vlandis* v. *Kline*, 412 U.S. 441, 93 S.Ct. 2230 (1973) in holding that the Ordinance in question created an unconstitutional irrebuttable presumption of unfitness on the part of the license holder while excluding all consideration of whether the license holder was at fault or was otherwise unfit to hold an occupational license.

B. The Respondent further demonstrates that the holding of the Sixth Circuit did not improperly interfere with Newport's exercise of its police power to abate a public nuisance. The administrative action initiated by the City of Newport involved a suspension and revocation of an occupational license. It was not an action to abate a public nuisance. The revocation notice issued to Respondent and the Ordinance under which the suspension and conditional revocation occurred make it quite clear that the administrative proceedings which are challenged in this case were proceedings to suspend an occupational license, and not proceedings to abate a public nuisance. Moreover, the decision of the Sixth Circuit requiring the City to consider whether a license holder is at fault with respect to the underlying criminal conduct of her employees is entirely consistent with this Court's decision in *Arcara* v. *Cloud Book, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986).

III. REASONS WHY THE PETITION SHOULD BE DENIED

A. THE DECISION OF THE SIXTH CIRCUIT IS ENTIRELY CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT AND DOES NOT IMPROPERLY CURTAIL THE LAWFUL EXERCISE OF POLICE POWER BY THE CITY OF NEWPORT.

At the outset the Petitioners mistakenly characterize the decision of the Sixth Circuit as applying "a close judicial scrutiny test to the presumption of knowledge requirement in the City of Newport's Occupational License Ordinance." (Petition at p. 5).

The Court of Appeals expressly found that Respondent "engages in a business that involves the exercise of First Amendment Rights." (Slip Opinion, p. 9, Appendix to Petition, p. 9a). The Sixth Circuit was apparently referring to this Court's decision in *Barnes* v. *Glen Theater, Inc.*, 111 S.Ct. 2456, 2462-63 (1991) where the Court held that nude dancing is not unprotected expression. (Slip Opinion, p. 13, fn. 4, Appendix, p. 13a). Given the effect of the Ordinance on Respondents' exercise of her First Amendment rights, the Court of Appeals would have been authorized to apply strict scrutiny to its review of the challenged Ordinance. Nevertheless, it chose to avoid the issue of whether the Ordinance, in the present context, violates the First Amendment. (*Ibid.* fn. 4). Consequently, rather than applying strict scrutiny to the Ordinance, it is evident that the Court below analyzed the Ordinance and its application to the facts of this case under a "rational relation test."

> . . . [T]he provisions of the Ordinance now under review cannot pass constitutional scrutiny under the *rational relation test* and thus violate the Due Process Clause of the Fourteenth Amendment . . . (Emphasis added).

(Slip Opinion, pp. 14-15, Appendix, pp. 14a-15a).

Contrary to Petitioners' assertion, the Court of Appeals did not improperly limit the police power of the City to regulate unlawful conduct. Indeed, the Court specifically notes that the City has a legitimate interest in regulating adult entertainment establishments and, more particularly, in inducing owners and operators of such establishments to "take responsibility for the conduct of employees who engage in illegal or prohibited activities by threatening suspension or revocation of their occupational licenses." (Slip Opinion, p. 9, Appendix, p. 9a). The Court proceeds to note that it was not questioning the validity of the City's interest, rather, the "question in this case is whether the means adopted by the City to attempt to achieve these goals are constitutional." *Ibid.*

The Petitioners mistakenly argue at page 6 of their Petition that the Court of Appeals "improperly required prior actual knowledge holding that anything less violated Due Process." First, it was not the Ordinance's "presumption of knowledge" which offended the Sixth Circuit. Rather, the Sixth Circuit was most concerned with the Ordinance's failure to require any showing of culpability on the part of the license holder.

> The Ordinance is thus a strict liability provision and the District Court's finding of presumed knowledge was both unnecessary under the Ordinance as drafted to obtain a revocation and created an essentially irrebuttable presumption that was contrary to the uncontested evidence that the Plaintiff did not know that her employees were engaged in prostitution and that *she took reasonable steps to attempt to prevent such conduct on her premises.* Nothing that the Plaintiff could have shown at her hearing before the City Commissioners or in the District Court would have prevented the Ordinance from being applied as written. (Emphasis added).

(Slip Opinion, p. 12, Appendix p. 12a). The Court of Appeals futher explained that the Ordinance contravened fundamental elements of due process by permitting a revocation of an

occupational license "without any showing that the operator had any control over the conduct of the employees or that the operator willfully ignored prohibited activity or otherwise knew of, or should have known of, or condoned illegal conduct . . ." (Slip Opinion, p. 13, Appendix 13a).

In essence, the Court of Appeals found that, absent some showing of some form of culpability or actual unfitness on the part of the license holder, principles of due process would prevent the government from exercising an otherwise legitimate police power to revoke the license. In so holding, the Sixth Circuit merely followed this Court's holding in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752 (1957). In *Schware*, this Court made it abundantly clear that any qualification or requirement for an occupation must bear a rational relation to the person's "*fitness* or capacity" to engage in a particular occupation or business. (Emphasis added). *Id.* 353 U.S. at 239, 77 S.Ct. at 756.

In the case at bar, the Sixth Circuit relied entirely on the undisputed record which was developed before the District Court. That record demonstrated not only that Respondent was completely unaware of the prostitution related conduct which her employees were accused of committing, but that she had taken affirmative steps to control the employees and to eliminate any risk of prostitution occurring on her premises. In the face of that uncontradicted evidence, the Sixth Circuit merely found that the Ordinance on its face, and as applied, bore no relationship to the license holder's fitness to hold the occupational license at issue.

> These provisions permit the City to deprive an operator of a protected property interest without any relation to the evils at which the Ordinance is allegedly aimed, and, having no requirement that the operator know or should know from the circumstances that violations of City Ordinances or State Statutes are occurring on the licensed premises . . . [t]he Ordinance thus creates an improper imposition of strict

> liability or creates an irrebuttable presumption and is overbroad.

(Slip Opinion, p. 15, Appendix, p. 15a).

The Ordinance as written and as applied to Respondent Armina Lee had the effect of completely depriving her of any opportunity to defend against the charges and to present evidence that she was, in fact, fit to continue to hold her occupational license. The Ordinance accomplished this by conclusively presuming unfitness simply upon the showing that employees had been convicted of criminal activity on the premises. In invalidating the Newport Ordinance, the Sixth Circuit properly followed the established law of this Court which mandates that "standards of due process require that the State allow such an individual the opportunity to present evidence . . ." *Vlandis* v. *Kline*, 412 U.S. 441, 93 S.Ct. 2230, 2236 (1973). The Court of Appeals properly applied this rule of law to the facts of this case in holding that,

> 'It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this [due process] standard.'

(Slip Opinion, p. 11, Appendix, p. 11a, quoting *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971)). The City Commission clearly violated this principle by concluding only that Respondent's employees had been convicted of criminal activity on the premises, thus ignoring the undisputed evidence that Ms. Lee was not culpable in any way.

It is evident that the Sixth Circuit was not at all concerned with limiting the legitimate police power of the City of Newport to control a variety of social evils. Rather, the Sixth Circuit shared this Court's concern that a government should not be permitted to revoke or suspend a license without any consideration of fault on the part of the license holder.

> *Bell* v. *Burson* held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered . . .

Stanley v. *Illinois*, 405 U.S. 645, 657, 92 S.Ct. 1208, 1216 (1972). The Court of Appeals did nothing more than apply this well established rule of constitutional jurisprudence.

In summary, the Sixth Circuit followed well established principles of due process as previously enunciated by this Court in *Vlandis* v. *Kline*, *supra*, *Bell* v. *Burson*, *supra*, and *Schware* v. *Board of Bar Examiners*, *supra*, in holding that the Newport Ordinance, by completely eliminating fitness to hold a license from consideration in suspension hearings, violated fundamental principles of due process and was, therefore, unconstitutional.

Given the Sixth Circuit's adherence to well established constitutional principles as previously enunciated by this Court, the Court should deny the Petition for Writ of Certiorari.

B. THE SIXTH CIRCUIT CORRECTLY APPLIED THE LAW ESTABLISHED BY THIS COURT AND DID NOT IMPROPERLY INTERFERE WITH NEWPORT'S EXERCISE OF POLICE POWER TO ABATE A PUBLIC NUISANCE.

Petitioners attempt to mischaracterize the license suspension and revocation proceedings at issue in this case as a "nuisance abatement" action. (Petition, p. 8). Petitioners do this in an apparent effort to support their argument that the decision of the Sixth Circuit is inconsistent with this Court's holding in *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986). The record in this case demonstrates unequivocally that the City's administrative proceedings were, in fact, occupational license suspension or revocation proceedings and not a nuisance abatement action. Moreover, Respondents will demonstrate that the decision of the Sixth Circuit is entirely consistent with this Court's pronouncement in *Arcara*.

Petitioners' efforts to redefine the proceedings before the City Commission as a nuisance abatement action is both puzzling and disingenuous. First, and most obvious, Petitioner James Parsons, as City Manager for the City of Newport, issued the notice which is challenged in this case. Mr. Parsons prepared the Notice and entitled it "Notice to Revoke or Suspend *Occupational License*." (Emphasis added). In the body of the Notice, Petitioners notify Armina Lee that she is required to "show cause, if any, why your *occupational license* should not be suspended or revoked . . ." (Emphasis added). (J.A. p. 16). Additionally, in the Notice issued by the City, Petitioner Parsons specifically refers to the Ordinance in question as "an occupational license ordinance of the City of Newport." (*Ibid.*). Finally, in the written Findings and Conclusions issued by the City Commission suspending and conditionally revoking Respondent's occupational license, the City Commission itself characterizes the proceedings as "charges . . . to suspend or revoke [Armina Lee's] occupational license . . ." (J.A., p. 27). The record leaves no

doubt that the challenged administrative action was an occupational license suspension/revocation proceeding, and not a nuisance abatement action as Petitioners would have this Court believe.

It is also important to note that Kentucky provides a statutory procedure for nuisance abatement. (See generally KRS 233.020). The Petitioners apparently chose instead to pursue a more convenient and expeditious route by administratively suspending Respondent's occupational license. The decision not to pursue statutory nuisance abatement action is not surprising since the undisputed evidence in this record was that there was no prior history of prostitution or other criminal activity occurring on the premises of the Brass Bull. (Slip Opinion, p. 6, fn. 3, Appendix, p. 6a, fn. 3). As mentioned, mischaracterizing the proceedings challenged in this case as nuisance abatement is consistent with Petitioner's effort to argue that the Sixth Circuit's decision is inconsistent with this Court's holding in *Arcara*, *supra*. To the contrary *Arcara* supports Respondent's position.

Clearly, *Arcara* was a nuisance abatement action. It is important to note that the county in that case made specific allegations of knowledge on the part of the proprietors and management of the premises. Indeed, it is fair to conclude that the substantial evidence of culpability on the part of the management was a factor which this Court considered in authorizing closure of the book store in question:

> A Deputy Sheriff personally observed instances of masturbation, fondling, and fellatio by patrons on the premises of the store, *all within the observation of the proprietor*. The Deputy Sheriff reported that the *management* of the "Village Books and News Store" *was fully aware* of the sexual activity on the premises. (Emphasis added).

Arcara v. *Cloud Books, Inc.*, *supra*, 478 U.S. at 699, 106 S.Ct. at 3173. Given the substantial evidence that the

management was directly involved in allowing sexual conduct to occur on the premises, the Court properly concluded that the injunction closing the premises was directed at unprotected sexual activity, and not at the selling of books.

Nothing that the Sixth Circuit has held in this case is inconsistent with this Court's holding in *Arcara*. Unlike *Arcara*, the Sixth Circuit specifically noted that the uncontroverted evidence offered at the hearing on the Motion for Preliminary Injunction demonstrated that Respondent had no knowledge of the unlawful conduct of her employees. More important, the undisputed evidence further demonstrated that Respondent made reasonable efforts to prevent any such conduct on her premises. In short, the record before the Sixth Circuit permitted only one logical conclusion: that Armina Lee had absolutely no culpability in the isolated incidents of criminal activity of her employees.

Since the City of Newport clearly ignored the evidence offered by Armina Lee that she took appropriate steps to control the conduct of her employees, and since the Ordinance in question necessarily excluded any consideration of Ms. Lee's fitness to continue to hold her occupational license, the Sixth Circuit correctly held the statute to be unconstitutional. In so holding, the Court simply followed well established precedent of this Court. For example, the Sixth Circuit followed the holding in *Schware* v. *Board of Bar Examiners*, *supra*, and found that the ordinance in question was constitutionally deficient since it excluded consideration of the license holder's fitness to hold a license. Following *Schware*, the Court of Appeals found that the government had no legitimate interest in depriving a person of an occupational license without considering "the person's fitness to engage in the particular occupation or business . . ." (Slip Opinion, p. 14, Appendix, p. 14a, citing *Schware* v. *Board of Bar Examiners*, 353 U.S. at 239, 77 S.Ct. at 756.

Again, the opinion and the holding of the Sixth Circuit is entirely consistent with well established precedent from this

Court. Additionally, there is no indication in the Petition that the decision of the Court of Appeals creates any conflict among the circuits.

The Sixth Circuit's faithful adherence to the previous decisions of this Court, and the absence of any conflict among the circuits, compels the conclusion that this Court should deny the Petition for Writ of Certiorari.

IV. CONCLUSION

Respondent has demonstrated that, in rendering the decision below, the Court of Appeals for the Sixth Circuit faithfully adhered to precedent established by this Court. The Court of Appeals properly applied a rational relation test and found Ordinance § 26-39(a)(1) to be unconstitutional in that it creates an irrebuttable and conclusive presumption of unfitness without considering any evidence of fault on the part of the license holder. While recognizing the City of Newport's inherent police power to regulate adult entertainment facilities, the Sixth Circuit correctly found that the City could not deny Respondent her occupational license without considering evidence relating to Armina Lee's fitness to hold such a license. Rather than departing from the constitutional rules established by this Court, the decision of the Sixth Circuit was mandated by this Court's decision in *Schware* v. *Board of Bar Examiners*, *supra*.

Petitioner has further demonstrated that the Sixth Circuit's holding that the Ordinance in question creates an unconstitutional irrebuttable presumption is consistent with the decision of this Court in *Vlandis* v. *Kline*, *supra*.

In short, Petitioners have failed to demonstrate any grounds consistent with Rule 10, Rules of the Supreme Court,

which would justify this Court's granting the requested Writ. Accordingly, we urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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